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In the Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, PETITIONER

v.

ANZ SECURITIES, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF INSTITUTIONAL INVESTORS AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the filing of a putative class action within three years after a security was offered or sold to the public serves, under the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to satisfy the three-year time limitation in § 13 of the Securities Act of 1933, 15 U.S.C. § 77m, with respect to the claims of putative class members.

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INTEREST OF THE AMICI

This brief is submitted on behalf of 75 institutional investors, which are identified in the appendix, and the National Conference on Public Employee Retirement Systems ("NCPERS").[1]

[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission

The institutional-investor amici curiae are public pension funds and other institutional investors that have over $4 trillion of assets under management and are responsible for investing the retirement funds and other investments of millions of people in publicly traded US securities. Amici have a strong interest in the effective enforcement of the securities laws, to deter fraud and to ensure compensation for those injured by violations of these laws.

NCPERS is the largest national, non-profit public pension trade association, with a membership that includes over 500 pension funds representing in excess of $2 trillion in assets. Since 1941, NCPERS has worked to protect the pensions of public employees. Because of NCPERS' interest in preserving retirement benefits for public employees, it is very concerned about fraudulent practices in the securities industry and the nation's capital markets. NCPERS recognizes the need to combat securities fraud and restrain corporate excess and appreciates the role of private securities class actions in providing a means to deter corporate wrongdoing and compensate victims of securities fraud.

Amici believe that the *American Pipe* rule is part of a reasonable procedural framework for litigation of securities class actions. Amici are concerned that, if the *American Pipe* rule were held to be inapplicable to the three-year limitations period applicable to claims under the Securities Act of 1933 under 15 U.S.C. § 77m (and the analogous five-year limitations period

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of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

applicable to claims under the Securities Exchange Act of 1934 under 28 U.S.C. § 1658(b)(2) and 15 U.S.C. § 78t-1(b)(4)), amici would incur significant expenses and would have to involve themselves in wasteful and duplicative litigation as a protective measure whenever, as is often the case, the applicable limitations period approaches with no decision on class certification. Indeed, these consequences are already occurring in the circuits that have held that *American Pipe* does not apply to the three-year limitations period under the Securities Act and the five-year limitations period under the Exchange Act, as well as in circuits that have not yet decided the question, rendering *American Pipe* protection uncertain. The result is additional costs for all involved, including defendants and the courts, with no compensating benefits to any of the interests Congress was trying to protect in enacting these limitations periods.

SUMMARY OF ARGUMENT

The *American Pipe* rule is part of a sound structure of class and individual litigation, and it is particularly important to institutional investors. Because they are entrusted by millions of people with funds to invest, institutional investors frequently have substantial amounts at stake in securities class actions. They therefore have to be concerned with any rule that would put their claims in jeopardy on the ground that the class-certification motion is not decided until after a limitations period has run. Under *American Pipe*, that possibility creates no problem, because institutional investors may still preserve their claims; if class certification is denied after the limitations period, they may intervene or file their own claims at

that time. But without the *American Pipe* rule, institutional investors frequently have sufficient stakes in the claims to make it advisable for them to take expensive and burdensome steps to preserve their claims in case the class is not ultimately certified.

Initially, without *American Pipe*, institutional investors have to monitor and analyze a large number of pre-certification class actions in distant forums around the country to ensure that the limitations period does not run without a decision on class certification. In addition to the costs of monitoring and analysis, institutional investors frequently have to intervene or file their own claims in the many cases in which the limitations period ends with no decision on class certification. These burdens on institutional investors are already occurring in the circuits that have held that the *American Pipe* rule does not apply to the three-year and five-year limitations periods under the Securities Act and the Exchange Act, respectively, and in circuits that have not decided the question.

Intervention itself can trigger an extra round of litigation on the intervention motion. If the intervention is successful, the ensuing litigation becomes more complex and costly for all parties, as the intervenors (and multiple institutional investors may intervene) participate at each step of the litigation.

Alternatively, institutional investors can file their own actions, perhaps in distant forums. That too imposes costs on all parties, as each individual case proceeds separately through motion practice, discovery, summary judgment, trial, and appeals. Multiplying litigation in that way is contrary to the purpose of Rule 23 of the Federal Rules of Civil Procedure and

otherwise wasteful, since the separate actions serve simply to protect against the possibility that the class might ultimately not be certified. Thus, the *American Pipe* rule, which avoids unnecessary expenses and the multiplication of parties and lawsuits, is sound.

Furthermore, courts can revisit class certification at any time. Therefore, even if a class is certified within the applicable limitations periods, institutional investors must consider in the absence of *American Pipe* protection whether to take affirmative steps to protect against potential *decertification* of the class after a limitations period has run. Finally, investors may be provided a second opportunity to opt out, for example, in connection with a proposed class settlement. Because class actions are commonly settled after the expiration of the applicable limitations periods, institutional investors must seriously consider taking early affirmative action to prevent a renewed opt-out right in connection with a settlement from becoming meaningless.

ARGUMENT

THE *AMERICAN PIPE* RULE AVOIDS WASTE AND MULTIPLICITY OF ACTIONS AND IS ESSENTIAL TO REALIZE THE BENEFITS OF EFFICIENCY OF CLASS ACTIONS

The *American Pipe* rule is part of a sound structure of class and individual litigation. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The basic principle of class litigation is that those who bring class actions act on behalf of the class, and the putative class members need not appear or participate in the action to protect their legal rights. The *American*

Pipe rule fulfills that principle by eliminating the need—which is particularly pressing for institutional investors that often have large stakes in the action—to engage in wasteful protective efforts and litigation that will all prove unnecessary if class certification is granted. Accordingly, *American Pipe* saves the time and resources of putative class members, the other parties to the case, and the judicial system itself.

A. Institutional Investors Have an Obligation to Protect the Funds with Which They Have Been Entrusted

Amici (as well as other institutional investors) invest billions of dollars in the public securities markets, on behalf of millions of beneficiaries.[2] While most individual, nonprofessional investors do not have a large interest in any single security, the pools of funds invested by institutional investors are large enough that their holdings of a given security are often substantial. Therefore, when a securities fraud or other violation causes losses to those who hold a particular issuer's securities, the loss suffered by a given institutional investor can also be substantial.[3]

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[2] Amici are public pension funds and other institutional investors. For convenience, this brief refers to all of those on whose behalf amici manage funds as "beneficiaries."

[3] Of course, some individual investors do have large interests in a single security. For example, entrepreneurs often sell their privately held companies to public companies for stock, thus becoming large holders of the acquirers' stock, and may become members of the class in a class action if the acquirer turns out to have violated the securities laws. *See, e.g.*, *Hildes v. Arthur Andersen LLP*, 734 F.3d 854 (9th Cir. 2013). All of the arguments in this brief concerning institutional investors' need, in the absence of *American Pipe* tolling, to protect their rights through

Institutional investors are stewards of the resources of their beneficiaries. In many cases, laws such as ERISA impose specific fiduciary duties on institutional investors to act "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1)(A), and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," 29 U.S.C. § 1104(a)(1)(B).

Even aside from statutory obligations like these, institutional investors are responsible for the funds they invest for their beneficiaries and take that responsibility seriously. Accordingly, they are necessarily involved in seeing to it that losses from illegal activity are recompensed when possible. While institutional investors would prefer to devote their time and resources to sound investment of the funds entrusted to them, they cannot disregard the losses caused to their funds by violations of the securities laws; they must consider whether action should be taken to recoup those losses through individual securities suits or class actions. Any rule that requires greater and unnecessary expense and wasteful participation in litigation to obtain compensation for the victims of securities violations will have a great adverse impact on institutional investors.

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expensive monitoring and individual litigation apply equally to individual investors with claims large enough to justify individual actions.

B. Holding *American Pipe* Inapplicable to the Three-Year Limitations Period Under the Securities Act and the Five-Year Period Under the Exchange Act Imposes Wasteful and Unnecessary Nonlitigation Costs on Institutional Investors

1. This case involves claims arising under Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*. These provisions prohibit materially untrue statements and omissions in registration statements and prospectuses issued in connection with the sale of securities. Section 13 of the Securities Act provides two time limits for bringing suit for violations of Sections 11 and 12. First, suit must be "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. Second, "[i]n no event shall any such action be brought to enforce a liability created under section 11 or section 12(a)(1) more than three years after the security was bona fide offered to the public, or under section 12(a)(2) more than three years after the sale." *Id.* The second time limit—three years after the offering or sale—is at issue in this case.

2. The untrue statements or omissions that are the basis of suits under Sections 11 and 12 are frequently not detected until well after the subject offering or sale, and thus well into the three-year period. And litigation over class certification may move slowly. In a brief filed at the certiorari stage of the *IndyMac* case (in which this Court granted the writ with respect to the same question presented here, but then dismissed the writ after the action was settled), amici Civil Procedure and Securities Law Professors presented an

empirical analysis of how long it takes for securities class actions to reach a class-certification order. They concluded that in approximately half of the Section 11 and 12 cases (and in 83% of the cases that reached a certification order), the three-year period would have expired before the court reached a certification order. *See* Br. of Civ. Pro. & Sec. L. Profs. as Amici Curiae in Support of Pet. for a Writ of Cert., *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640, 2013 WL 8114524, at *8 (U.S. filed Dec. 26, 2013). Applying the same analysis, approximately one-fourth of Rule 10b-5 class actions (and 76% of the actions that reached a certification order), which also could be affected by the decision in this case, do not reach class certification before the five-year limitations period under 28 U.S.C. § 1658(b) expires. *See id.* at *9. For securities class actions as a whole, amici professors estimated that at least one-fourth of the cases fail to reach class-certification decisions before those or comparable limitations periods expire. *See id.* at *10. There is reason to believe that this estimate is conservative. *See id.* at *10-11.

The length of time until a class-certification decision is reached in a case has likely increased over the years. Recent decisions of this Court have made class certification a more complex enterprise. In both *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Court emphasized the need for the plaintiff to prove facts necessary to establish that class certification satisfies the requirements of Rule 23, even when those facts overlap substantially with the merits of the underlying claim. *See Wal-Mart*, 564 U.S. at 349-51; *Comcast*, 133 S. Ct. at 1432. And in *Halliburton*

Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) ("*Halliburton II*"), the Court held that in 10b-5 class actions where (as is essentially always the case) the plaintiff seeks to rely on the fraud-on-the-market presumption of reliance, defendants may seek "to defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Id.* at 2414. Accordingly, these decisions have increased the complexity of class-certification motions, and, hence, are likely to increase the amount of time it will take before the certification decision can be made. These decisions may also increase the risk that even if a class is certified before the applicable limitations periods have run, the class may later be decertified after the limitations periods have run.

3. Under the *American Pipe* rule, the frequent expiration of the limitations period before a class-certification decision does not impose any special burden on institutional investors. While their securities holdings frequently make them members of the putative classes at issue, institutional investors may rely on the commencement of a class action to satisfy the applicable time limits. To be sure, even under *American Pipe*, institutional investors may ultimately have to consider whether to bring their own cases raising similar claims, if class certification is denied. But they need not act speculatively and protectively *before* a class-certification decision. They may instead wait until there is a decision denying class certification and take appropriate action then. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

Indeed, many institutional investors prefer, in most securities cases in which they have significant financial interests, to remain members of the class and not intervene or file separate actions. There are a number of reasons for this. First, unlike remaining a passive class member, intervening or filing an individual action imposes costs and expenses of litigation and also imposes burdens on management, who must monitor the litigation. Second, an intervenor or separate plaintiff must produce documents in discovery, answer interrogatories, and provide witnesses for deposition, whereas absent class members are not ordinarily subject to discovery. Third, an intervenor or plaintiff loses confidentiality, whereas other class members are not ordinarily publicly named. Thus, remaining in the class commonly has advantages for institutional investors.

Without the protection of *American Pipe*, however, institutional investors are not able to wait until class certification is denied to determine whether to intervene or file their own suit. The only way for them to protect their beneficiaries' interests in each case in which they have significant losses is to engage in ongoing monitoring of the status of class certification and the nearness of the limitations date as the case is being litigated. They also have to analyze each case at these early stages to determine the strength of their claims, the likelihood of prevailing, the potential damages recovery, and their stake in that recovery. They even have to analyze the named plaintiff's standing to bring the claims, the plaintiff's adequacy and typicality under Rule 23, and the claims' commonality under *Wal-Mart* and *Comcast* to assess the plaintiff's chances of prevailing on class certification. Only by

monitoring and analyzing all of these complex aspects of the case can they determine whether their interest in the case and the odds of class certification warrant taking protective action—intervention or filing a separate suit—as the three-year time limit in a Securities Act case (or the five-year time limit in an Exchange Act case) approaches without class certification. And this monitoring, which requires management time and may require payment of legal and expert fees, is burdensome and expensive.

Even keeping track of relevant limitations periods in securities class actions can be complex and burdensome, as the periods are generally measured from the date of each alleged misstatement or material omission, and a single case may involve numerous alleged misstatements and omissions. The dates of all of the alleged misstatements and omissions must then be cross-referenced against the institutional investor's individual trading in the relevant security to determine whether the expiration of each limitations period is material to the investor, and thus whether intervention or individual litigation is warranted, and at what point in time.

4. From 1997 through 2015, an average of slightly fewer than 190 securities class actions were filed each year.[4] From 2001 through 2015, an average of 5.2% of the large, publicly traded companies in the S&P 500 index, in which many institutional investors have

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[4] *See* Cornerstone Research, *Securities Class Action Filings: 2016 Year in Review* 1 (2017), *available at www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR*. This number was a historically high 270 in 2016. *See id.*

substantial interests, were subject to new federal securities class actions in each year.[5] Without the protection of *American Pipe*, merely monitoring each case in which an institutional investor might be interested to ensure that the three-year (or other) limitations period does not expire before class certification imposes a serious and costly burden. Keeping track of the progress of litigation in large numbers of distant cases is not an easy task in any event. It is particularly hard when the institutional investor, as a potential class member, is not a participant in the proceedings. *See Am. Pipe*, 414 U.S. at 552 ("Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it."). Keeping track of the expiration of the limitations period itself can be challenging, as complaints frequently charge a number of different events, each of which may be the triggering date for the limitations period. Moreover, complaints can be amended as litigation progresses, which can in turn affect the limitations period.

Aside from monitoring, without the *American Pipe* rule, institutional investors have to analyze each case in order to determine whether intervening in the class suit or filing an independent suit would be warranted. As a case progresses, the scope of the claims and the likelihood of success are frequently clarified—including, especially after *Wal-Mart*, *Comcast*, and *Halliburton II*, in the process of class certification.

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[5] *See id.* at 23. This percentage was a historically high 8.4% in 2016. *See id.*

Indeed, some issues that may be decided at or before the class-certification stage may be dispositive of the entire case. If, for example, the class-certification proceedings establish that an asserted misstatement in a Rule 10b-5 case was not publicly known, that would likely doom even an individual action claiming that a fraudulent statement affected the market price at which the plaintiff bought or sold the security. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Or if a motion to dismiss or other dispositive motion in the class action were decided before class certification, once again the investor would know that an individual case raising the same claim would likely fail. *See, e.g., Maracich v. Spears*, 133 S. Ct. 2191 (2013) (vacating denial of pre-certification motion to dismiss); *Morrison v. Nat'l Australia Bank*, 561 U.S. 247 (2010) (affirming grant of pre-certification motion to dismiss). Without the *American Pipe* rule, institutional investors do not have the benefit of these rulings in determining their stake in the case. Engaging in that kind of analysis of each of the possibly several hundred pending and not-yet-certified class actions in which the institutional investor has a substantial interest is very costly and, if class certification is ultimately granted, entirely unnecessary.

Finally, courts can revisit class certification at any time. *See* Fed. R. Civ. P. 23(c)(1)(C). Therefore, even if a class is certified within the applicable limitations periods, institutional investors must consider in the absence of *American Pipe* protection whether to take affirmative steps to protect against potential *decertification* of the class after a limitations period has run—including as a result of the concerns articulated

in *Wal-Mart*, *Comcast*, and *Halliburton II*. Alternatively, courts may provide investors with a renewed opportunity to opt out, such as in connection with a proposed class settlement. *See* Fed. R. Civ. P. 23(e)(4). Because class actions are commonly settled after the expiration of the applicable limitations periods, institutional investors must seriously consider taking affirmative (yet potentially unnecessary) action to preserve their potential right to opt out of a possible class settlement they may consider inadequate.

C. Holding *American Pipe* Inapplicable Imposes Even More Wasteful and Unnecessary Litigation Costs on All Parties to the Litigation and on the Judicial System

In the circuits where institutional investors cannot rely on the *American Pipe* rule, the increased and unnecessary costs consist not merely in the increased expense of monitoring and analyzing pending class actions. The costs also include increased and wasteful litigation. The costs of that litigation are borne not merely by institutional investors, but by all involved, including the other parties to the case and the judicial system itself.

For example, in one currently pending securities-fraud class action in the Second Circuit, approximately 500 institutional investors (and their managed funds and accounts) filed individual actions that are proceeding alongside a class action (in which a Rule 23(f) appeal is now pending). *See Univs. Superannuation Scheme Ltd. v. Petróleo Brasileiro S.A.-Petrobras*, No. 16-1914-cv, Brief of Defendants-Appellants Petróleo Brasileiro S.A.-Petrobras, et al., at *6

(2d Cir. filed July 21, 2016). These institutional investors were obligated to file individual actions because the class period in the *Petrobras* case, which involves an alleged "multi-year . . . bribery and kickback scheme," is five-and-a-half years long—January 22, 2010 to July 28, 2015. *In re Petrobras Sec. Litig.*, 312 F.R.D. 354, 357 (S.D.N.Y. 2016). The class was not certified, however, until February 2016, more than six years after the start of the alleged fraud. *See id.* As a result, there was a serious risk that the three-year and five-year limitations periods for Securities Act and Exchange Act claims, respectively, would expire before the class was certified. Indeed, some institutional investors that filed individual actions had their Securities Act and Exchange Act claims dismissed for that reason as a result of the Second Circuit's intervening decision in *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). *See In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 198-99 (S.D.N.Y. 2016). But hundreds of others filed timely individual actions in light of *IndyMac*. Thus, the burdensome multiplication of individual actions as a result of the Second Circuit's refusal to apply *American Pipe* to securities actions is no mere specter, but a reality.

1. As discussed above, class-certification decisions frequently do not take place until after the three-year or other relevant limitations period has passed. If *American Pipe* did not apply to that period, class-certification decisions would likely be delayed even longer, because defendants would have an incentive to prolong pre-certification discovery and other litigation in the hope that denial of certification would

leave absent class members unable to pursue any individual remedies. Yet whenever that limitations period comes close to expiration, institutional investors that want to preserve their interests face significant pressure either to intervene in the class action or to file their own cases. Either alternative requires the institutional investors to retain counsel to file the necessary papers and conduct the proceedings, which itself would be a needless expense in the large number of cases in which the class is ultimately certified. Moreover, unnecessary intervention motions and the filing of unnecessary new cases, perhaps in distant forums, themselves create new, wasteful, and duplicative tangles.

2. *Intervention.* Before a class is certified, putative class members who want to appear in the case must intervene under Rule 24. As this Court has explained, "[p]utative class members frequently are not entitled to intervene as of right under Fed. R. Civ. P. 24(a), and permissive intervention under Fed. R. Civ. P. 24(b) may be denied in the discretion of the District Court." *Crown, Cork & Seal*, 462 U.S. at 350 n.4. Specifically, although a court "*may* permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1) (emphasis added), permitting intervention is discretionary. "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Courts also consider the length of time the prospective intervenor delayed after having notice of the litigation before seeking intervention. *See In re*

Bank of New York Derivative Litig., 320 F.3d 291, 300 (2d Cir. 2003).

Defendants in securities cases are likely not to welcome intervention, which can only increase the cost and complexity of the litigation. The named plaintiffs too may not want to be joined by intervenors, who may well have different ideas from the named plaintiffs (and, perhaps, from each other) about how the litigation should be conducted. As a result, the bases for intervention may become fertile grounds for litigation. Parties may dispute how much delay is too much, *see, e.g.*, *In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 234-36 (S.D.N.Y. 2012), and whether they will suffer prejudice, *see, e.g.*, *In re Bank of New York Derivative Litig.*, 320 F.3d at 300.

Moreover, if intervention is granted, not only the intervenors but also the existing parties will likely incur increased costs. The intervenors will likely seek to take discovery from the defendants and third parties and will be subject to discovery by the other parties. Motion practice and timing will become more complicated, because there are more parties involved in the proceedings. Once the intervenors are full parties to the action, they may well have different strategic or substantive approaches than the named plaintiff; having invested the resources to become parties, the intervenors may decide to contend vigorously for their own procedural and substantive preferences. Even if class certification is ultimately granted, enabling the intervenors to revert to being passive class members, institutional investors that have already devoted resources to intervening and litigating a case may well decide to continue as active plaintiffs. The result of all

this can only be increased costs and complexity for all parties and the court.

This "multiplicity of activity," *Am. Pipe*, 414 U.S. at 551, may be particularly costly because there could easily be more than one intervenor in a case. Especially if the case involves a large, widely held security, many institutional investors are likely to have significant stakes in the litigation that warrant protection. Without the ability to rely on a class action to prevent claims from becoming time-barred, multiple interventions in a given case could easily occur.

3. *Filing independent actions.* Alternatively, institutional investors that are faced with a looming end to the limitations period and no decision on class certification may choose to file their own actions. But once an institutional litigant is faced with the expense of retaining counsel and litigating its own claim, it may well choose a forum that is more convenient for it than the one chosen by class counsel, and it may also choose to frame its action in a way that differs from the class action. Each new complaint of course would trigger a new round of litigation: motions to transfer, motions to dismiss, answers, discovery, *Daubert* hearings, summary judgment, etc. The result could easily be a series of overlapping actions addressing the same or similar claims in a variety of different forums.[6]

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[6] Cases may be transferred "for the convenience of parties and witnesses" and "in the interest of justice" under 28 U.S.C. § 1404(a), and multiple cases "involving one or more common questions of fact" may be transferred to a single district for pretrial proceedings under 28 U.S.C. § 1407(a). Nonetheless, the transfer itself involves further costs; the cases remain separate

Of course, it is true that institutional investors in any securities case could always choose to file their own actions rather than remain members of a class, and there is therefore always some risk of duplicative litigation. Indeed, members of Rule 23(b)(3) classes have a right to opt out and, if they wish, pursue litigation on their own rather than as members of the class. *See* Fed. R. Civ. P. 23(c)(2)(B)(v). But eliminating the *American Pipe* rule for securities class actions effectively eliminates the opt-out right that class members may exercise after class certification in the large number of cases in which class certification occurs after the limitations period has run, including in connection with proposed class settlements. No one would exercise an opt-out right if the alternative were to try to litigate an untimely claim on one's own.

This Court should avoid the serious constitutional question that would be presented by effectively eliminating the opt-out right by not applying *American Pipe* to the limitations periods at issue. The opt-out right is required to preserve each class member's due process right to file an individual claim for damages.

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even after the transfer; and under Section 1407(a), the cases must ultimately be transferred back to their original districts after pretrial proceedings are completed. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Finally, transfer motions may be denied, leading to a multiplicity of actions in different courts. *See, e.g., In re Petrobras Sec. Litig.*, No. MDL 2728, 2016 WL 4153597 (J.P.M.L. Aug. 5, 2016) (denying transfer from Pennsylvania to New York, where related class action is pending); *Vanguard Specialized Funds v. VEREIT Inc.*, No. CV-15-02157-PHX-ROS, 2016 WL 5858735, at *9 (D. Ariz. Oct. 3, 2016) (denying transfer from Arizona to New York, where related class action is pending).

See Wal-Mart, 564 U.S. at 363; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Without class-action tolling, however, the right is meaningless, because only *American Pipe* tolling ensures that "the right to opt out and press a separate claim remain[s] meaningful." *Crown, Cork & Seal*, 462 U.S. at 351-52; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974) ("[P]rocess which is a mere gesture is not due process."). As the Tenth Circuit put it, if *American Pipe* tolling were not applied to the limitations periods at issue, "the notice and opt-out provision of Rule 23(c)(2) would be irrelevant without tolling because the limitations period for absent class members would most likely expire, 'making the right to pursue individual claims meaningless.'" *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000) (quoting *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999)). This Court should apply *American Pipe* here to avoid this constitutional question.

Instead of the post-certification opt-out, there is an incentive in the absence of *American Pipe* tolling for institutional and other plaintiffs to file independent actions *before* class certification to protect their claims from the possibility that the class will ultimately not be certified (or be decertified) and the limitations period will have expired. And the decision to file separate suits is likely a less informed one, simply because it takes place earlier in the litigation, when less is known about the case. If the class were ultimately certified (or even if the case were ultimately dismissed before certification on grounds that would preclude individual actions), all of this litigation would turn out to be unnecessary.

4. *Waste of Judicial and Party Resources.* The net result is that removing *American Pipe* protection encourages costly, duplicative litigation, which, if class certification is ultimately granted, would be simply a waste of resources. This Court explained in *American Pipe* that a class action is "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550. Yet removing the protections of *American Pipe* in this important class of cases has had precisely the opposite effect in the circuits that have done so. It "frustrate[s] the principal function of a class suit" by encouraging "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551. The "efficiency and economy of litigation," which this Court has termed "[t]he principal purposes of the class action procedure," are frustrated. *Crown, Cork & Seal*, 462 U.S. at 349.

Congressional policy strongly favors federal securities class actions to protect investors' rights and promote complete and accurate disclosure by issuers of publicly traded securities, and this Court has acknowledged that policy's importance. In the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995), Congress adopted a variety of procedural and substantive reforms, including "heightened pleading requirements," "limit[s on] recoverable damages and attorney's fees," "a 'safe harbor' for forward-looking statements," "new restrictions on the selection of (and compensation awarded to) lead plaintiffs," "imposition of sanctions for frivolous litigation," and "a stay of discovery pending resolution of any motion to dismiss." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184,

1200 (2013) (citation omitted). In the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998), Congress acted to ensure that securities class actions would be litigated in federal rather than state court, reflecting "the congressional preference for national standards for securities class action lawsuits involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 87 (2006) (citation and internal quotation marks omitted).

Although Congress in these reforms acted to address perceived abuses, it did not adopt proposals that were before it and that would have eliminated or otherwise significantly disfavored securities class actions. To the contrary, some of the new provisions, including the one giving preference to institutional investors as lead plaintiffs, *see* 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I), 78u-4(a)(3)(B)(iii)(I), were premised on the need "to improv[e] the quality of representation in securities class actions" and thereby improve these actions' ability to serve their historic functions of compensating victims of securities-law violations and deterring future violations. H.R. Conf. Rep. No. 104-369, at *34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (1995). Thus, "[n]othing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007) (quoting *Merrill Lynch*, 547 U.S. at 81)). Indeed, "the effectiveness of the securities laws" depends "in large measure on the application of the class action device." *Yang v. Odom*, 392 F.3d 97, 109 (3d

Cir. 2004) (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985)).

Adding wasteful and unnecessary costs to be borne by the parties and the judicial system seriously undermines securities class actions' efficacy in achieving these important objectives. Removing the protection of *American Pipe* has had that effect in the circuits that have done so—and in other circuits where *American Pipe* protection is uncertain—and should be rejected by this Court.

D. The Rationales for the *American Pipe* Rule Apply Equally Here

All of the grounds for the *American Pipe* rule in other limitations contexts apply equally to the three-year time limit in Section 13 (and the five-year limit applicable to Exchange Act cases). As the Court has explained, eliminating the *American Pipe* rule in this context, as in other contexts, "would frustrate the principal function of a class suit." 414 U.S. at 551. Without *American Pipe*, "[p]otential class members would be induced to file protective motions to intervene," *id.* at 553, and a putative class member "would have every incentive to file a separate action prior to the expiration of his own period of limitations." *Crown, Cork & Seal*, 462 U.S. at 350-51. "The principal purposes of the class action procedure—promotion of efficiency and economy of litigation—would thereby be frustrated." *Id.* at 349.

Those conclusions are as true of the three-year period in Section 13 as they are of the one-year period in Section 13, the Clayton Act limitations period in *American Pipe*, and the Title VII limitations period in

Crown, Cork & Seal. Given the class-action mechanism, there is no reason for a sound procedural system to throw away its benefits by essentially imposing higher costs on putative class members and ultimately requiring them to engage in wasteful and duplicative litigation in order to avoid the limitations bar while class certification is pending.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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MARCH 6, 2017

APPENDIX

APPENDIX

List of Amici Curiae

Aegon Asset Management is a global asset manager. As of the end of 2016, Aegon Asset Management had EUR 331 billion ($350.8 billion USD) in assets under management.

AP7 is the Swedish state-owned default alternative to private investment funds in the Swedish public premium pension program. As of March 1, 2017, AP7 manages SEK 342.2 billion ($37.6 billion USD) of which SEK 314.7 billion ($34.6 billion USD) is invested in global equity and private equity investments.

APG Asset Management NV manages pension assets for approximately 4.5 million beneficiaries on behalf of its pension fund clients. APG manages pension assets for 20% of all families in the Netherlands. The firm invests in the public equity, fixed income, and alternative investments markets across the globe with approximately EUR 443 billion ($468 billion USD) in assets under management.

Arkansas Public Employees Retirement System provides retirement income to state, county and some municipal employees, college and university employees, non-teaching public school employees, and other non-state employees in the State of Arkansas.

Arkansas Teacher Retirement System provides retirement, disability, survivor and death benefits to public school teachers and other educationally related employees in the State of Arkansas.

ATP is a Danish mandatory savings scheme with more than five million members. As of the end of 2016, ATP had DKK 759 billion ($108.2 billion USD) in assets under management.

Automotive Industries Pension Trust Fund provides retirement benefits to individuals working as machinists or in related crafts involved in the maintenance and repair of consumer vehicles, commercial transport and industrial transport primarily in the Northern California area.

Baillie Gifford Overseas Limited provides investment management and advisory services to a range of global clients and is wholly owned by Baillie Gifford & Co. As of December 31, 2016, the Group had $180 billion USD in assets under management and advice.

Blue Sky Group is an independent pension administrator with 102,000 participants and EUR 19 billion ($20.1 billion USD) in assets under management.

California State Teachers' Retirement System provides retirement, disability and survivor benefits for full-time and part-time public school educators and their families in the State of California. It is the largest teachers' retirement system and second largest public pension fund in the United States.

Cambridge Retirement System provides retirement, disability, and other benefits to employees of the City of Cambridge, Cambridge Housing Authority, Cambridge Public Health Commission and Cambridge Redevelopment Authority in the Commonwealth of Massachusetts.

City of Atlanta Firefighters' Pension Fund provides retirement, death, and disability benefits to firefighters and their beneficiaries in the City of Atlanta, Georgia.

City of Dania Beach Police & Firefighters' Retirement System provides retirement, death and disability benefits for police officers, firefighters, and their beneficiaries. Pension plan participants were formerly employed by the City of Dania Beach, Florida and are now employed by the Broward County (Florida) Sherriff's Office pursuant to an interlocal agreement for services.

City of Fort Lauderdale Police and Fire Retirement System is a single employer, defined benefit retirement system covering more than 1,800 active and retired police officers and firefighters of the City of Ft. Lauderdale, Florida.

City of Hollywood Police Officers' Retirement System is a single employer, defined benefit retirement System covering more than 600 active and retired police officers of the City of Hollywood, Florida.

City of Miami Firefighters and Police Officers Retirement System is a single employer, defined benefit retirement system covering more than 4,100 active and retired police officers and firefighters of the City of Miami, Florida.

City of Miami Police Relief and Pension Fund is a single employer, defined contribution retirement plan covering sworn police officers of the City of Miami. The Fund has approximately 1,500 active participants.

City of Palm Bay Police and Fire Retirement System is a single employer defined benefit retirement system covering 436 active and retired police officers and firefighters in the City of Palm Bay, Florida.

City of Philadelphia, Board of Pensions and Retirement: The City of Philadelphia is a municipal corporation organized under the laws of the Commonwealth of Pennsylvania and the Philadelphia Home Rule Charter, and is a political subdivision of the Commonwealth of Pennsylvania. The Board of Pensions and Retirement is an independent board of the City of Philadelphia under the Philadelphia Home Rule Charter. The Board of Pensions and Retirement is charged with the maintenance of the retirement system for all City employees, and provides benefits to police, fire and civilian workers of the City of Philadelphia through the administration of 18 separate plans adopted from 1915 to the present. The City of Philadelphia Public Employees Retirement System, which is maintained by the Board of Pensions and Retirement, is funded by the City of Philadelphia and employees of the City.

Colorado Public Employees' Retirement Association provides retirement and other benefits to the employees of government agencies and public entities in the State of Colorado.

Denver Employees Retirement Plan provides retirement benefits to members of the City and County of Denver, Colorado, the Denver Employees Retirement Plan and the Denver Health and Hospital Authority.

The Employees Retirement System of the City of St. Louis provides retirement benefits for various public employees providing services to the inhabitants of the City of St. Louis.

The Employees' Retirement System of the State of Hawaii provides retirement, disability, and survivor benefits for State employees, teachers, professors, county employees, police officers, firefighters, judges, and elected officials.

Erie County Employees Retirement System is administered by the Erie County Retirement Board and provides retirement benefits to the employees of Erie County, Pennsylvania.

Fire & Police Pension Association of Colorado administers a statewide multiple employer public employee retirement system providing defined benefit plan coverage as well as death and disability coverage for police officers and firefighters throughout the State of Colorado.

Firefighters Retirement System of Louisiana is a multi-employer statewide defined benefit retirement system covering firefighters in 124 municipalities, parishes, and fire districts in the State of Louisiana.

Första AP-fonden is one of five buffer funds in the Swedish national income pension system. Första AP-fonden has assets under management of SEK 290.2 billion ($32 billion USD) (as of February 19, 2016) in a global portfolio.

Fresno County Employees' Retirement Association is a multiple employer public retirement system that provides retirement benefits for eligible employees, and their beneficiaries, of the County of Fresno,

Fresno County Superior Court, Fresno-Madera Area Agency on Aging, Clovis Veterans Memorial District, and Fresno Mosquito and Vector Control District.

Government Employees' Retirement System of the Virgin Islands administers retirement benefits for government employees, elected officials and retirees of the Virgin Islands.

Government of Guam Retirement Fund provides retirement, health, disability, and other benefits to employees and their beneficiaries of the Government of Guam.

Houston Firefighters' Relief and Retirement Fund provides retirement, disability and survivor benefits for firefighters of the City of Houston, Texas.

Illinois Municipal Retirement Fund provides retirement, disability, and death benefits to employees of local governments and school districts in the State of Illinois.

Industriens Pension administrates the labor market pension scheme for the employees under the Collective Bargaining Agreement for Industrial Employees. The labor market pension scheme is a compulsory scheme. Industriens Pension currently has around 400,000 members in approximately 8,000 companies with approximately DKK 180 billion ($21.3 billion USD) in assets under management.

Lord Abbett is an independent, privately held investment manager headquartered in Jersey City, New Jersey. The firm manages approximately $140 billion and offers a variety of fixed-income and equity strategies to individual and institutional investors.

The Los Angeles County Employees Retirement Association (LACERA) is a California public pension fund, which administers retirement, disability, and death benefits to more than 165,000 employees and retirees, and their beneficiaries of Los Angeles County and outside districts.

The Louisiana Sheriffs' Pension and Relief Fund (LSPRF) is a multi-employer, defined benefit retirement plan providing disability, death and retirement benefits to more than 20,000 sheriffs, deputy sheriffs, and tax collectors in the state of Louisiana. LSPRF is an institutional investor with more than $2.5 billion in assets and has been an active litigant in securities matters for the recovery of monies lost due to violation of federal securities laws. The LSPRF is directly interested in the maintenance of the reasonable standard established in *American Pipe*.

Maryland State Retirement and Pension System administers retirement, death, and disability benefits for employees, teachers, police, judges, law enforcement officers, correctional officers and legislators of the State of Maryland, as well as employees and law enforcement personnel of participating local governments in Maryland.

Montana Board of Investments is responsible for investing all state agency funds and local government funds under a unified investment program for the State of Montana.

MP Investment Management A/S manages assets for the Pension Fund for Danish MA's, MSc's and PhD's, and is fully owned by the pension fund. There

are approximately 120,000 members and assets under management total approximately $15 billion USD.

The National Conference on Public Employee Retirement Systems ("NCPERS") is the largest national, non-profit public pension trade association, with a membership that includes over 500 pension funds representing in excess of $2 trillion in assets. Since 1941, NCPERS has worked to protect the pensions of public employees.

The New York City Employees' Retirement System ("NYCERS"), the New York City Police Pension Fund ("PPF"), the New York City Fire Department Pension Fund ("FDPF"), the Board of Education Retirement System of the City of New York ("BERS"), and the Teachers' Retirement System of the City of New York ("TRS") are pension systems that provide retirement, disability, and death benefits to active and retired New York City employees. Collectively, the five New York City pension systems constitute the largest municipal pension fund in the United States, with more than $170 billion in assets under management.

The New York State Common Retirement Fund ("NYSCRF") holds and invests the assets of the New York State and Local Retirement System ("NYSLRS") which provides service and disability retirement benefits, as well as death benefits to state and local government employees and employees of certain other participating employers in the State of New York. As one of the largest public pension funds in the United States, NYSCRF invests on behalf of NYSLRS' more than one million members, beneficiaries, and retirees.

New York State Teachers' Retirement System ("NYSTRS") administers a defined benefit plan that provides retirement, disability and death benefits to New York State public school teachers and administrators (outside of New York City). It is the second largest public retirement system in New York State and one of the ten largest public pension funds in the nation.

NN Investment Partners is the asset manager of NN Group NV, a publicly traded corporation. As of September 31, 2016, their assets under management totaled up to EUR 199 billion ($210.4 billion USD).

The Office of the Treasurer as Trustee for the State of Connecticut Retirement Plans and Trust Funds ("Plans and Trust Funds"), each of which provide public pension funds for active, inactive, and retired state employees in Connecticut, and other governmental functions.

Operating Engineers Pension Trust provides retirement benefits to construction workers and their survivors, including heavy equipment operators, mechanics, concrete pumpers, soil testers, inspectors, and surveyors.

Pennsylvania Public School Employees' Retirement System is a defined benefit plan serving over 482,000 active and retired public school employees of the Commonwealth of Pennsylvania.

The Pennsylvania State Employees' Retirement System manages the pension benefits of more than 230,000 employees and retirees for 104 public sector employers in the Commonwealth of Pennsylvania.

The System is one of the nation's oldest and largest statewide retirement plans for public employees.

The Pension Reserves Investment Management ("PRIM") Board of the Commonwealth of Massachusetts is the trustee of the Massachusetts Pension Reserves Investment Trust ("PRIT") Fund, a defined benefit public pension fund with approximately 285,000 beneficiaries. PRIM works diligently on behalf of current and retired Massachusetts state employees and teachers, and also approximately 100 local municipal and county retirement systems throughout the Commonwealth of Massachusetts, to invest their pension assets in a manner that maximizes returns while mitigating risk.

PFA Pension forsikringsaktieselskab is a Danish pension fund with 1.1 million pension clients and over DKK 500 billion ($71.1 billion USD) in assets under management.

PGGM Investments manages pension assets for approximately 2.5 million beneficiaries in the Netherlands on behalf of its pension fund clients. As of the end of 2016, PGGM had EUR 200 billion ($210.1 billion USD) in assets under management.

The Public Employee Retirement System of Idaho provides retirement, disability, survivor, and other benefits to public employees working for more than 775 employers across the State of Idaho.

The Regents of the University of California ("the University") manages a portfolio of investments which provides benefits to current and retired employees and their beneficiaries. In addition, the Uni-

versity has a separate investment portfolio, its General Endowment Pool (est. 1933), which consists of over 5,000 individual endowed gift funds which support the University's mission of education, research and public service.

Robeco Institutional Asset Management B.V. ("Robeco") is an independently operated asset management company, indirectly wholly owned by Orix Corporation, a publicly traded corporation based in Tokyo, Japan. As of December 31, 2016, Robeco had EUR 139 billion ($147 billion USD) in assets under management.

Rockledge Firefighters', Rockledge General Employees' & Rockledge Police Officers' Retirement Plans manage the retirement plans for fire department, police department, and general employees of the City of Rockledge, Florida.

Sacramento County Employees' Retirement System provides retirement, disability, and survivors' benefits to employees of the County of Sacramento, California, the Superior Court of the County of Sacramento, and eleven special districts within the County of Sacramento.

San Mateo County Employees' Retirement Association is responsible for providing retirement, disability and survivor benefits to officers and employees of the County of San Mateo, the Superior Court of the County of San Mateo, and the San Mateo County Mosquito and Vector Control District in California.

Santa Barbara County Employees' Retirement System is responsible for providing retirement, disability, death and survivor benefits for employees of

the County of Santa Barbara and contracting districts.

SEB Investment Management is one of the largest commercial asset managers in Scandinavia. As of December 31, 2016, SEB Investment Management had EUR 95 billion ($100.7 billion USD) in assets under management.

Skandia Mutual Life Insurance Company is a mutual insurance company incorporated in Sweden, and the parent company of the Skandia group. The Skandia group is one of the largest independent providers of products for long-term savings and investments in Sweden, with approximately 2,700 employees and 2 million customers. As of the end of 2016, the Skandia group had assets under management of about SEK 607,000 million ($67.2 billion USD).

Sonoma County Employees' Retirement Association provides retirement, disability, death, and survivor benefits to the employees of the County of Sonoma, California.

The South Carolina Retirement System Investment Commission (RSIC) is responsible for investing and managing all assets of five governmental defined benefit plans, including the South Carolina Retirement System (collectively the "Systems"). RSIC is a seven-member commission, including the State Treasurer, the Director of the Public Employee Benefit Authority (PEBA), and a retired member of the Systems.

State Board of Administration of Florida is responsible for investing the assets of the Florida Retire-

ment System Trust Fund, one of the largest public retirement plans in the United States, as well as the assets of a variety of other state funds.

State of Wisconsin Investment Board is responsible for managing the assets of the Wisconsin Retirement System, the State Investment Fund (SIF) and other trust funds of the State of Wisconsin.

Storebrand is a financial services company listed on the Oslo stock exchange. Storebrand's main activities are related to life insurance and pension savings. By the end of 2016, Storebrand had NOK 577 billion ($68 billion USD) in assets under management.

Universities Superannuation Scheme was established in 1975 as the pension scheme for universities and other higher education institutions in the United Kingdom. It has around 375,000 scheme members across nearly 400 institutions and is one of the largest pension schemes in the UK, with total fund assets of approximately £56 billion (as of September 30, 2016).

Utah Retirement Systems provide retirement and insurance benefits to Utah public employees.

Virginia Retirement System administers pension plans and other benefits for public sector employees of the Commonwealth of Virginia.

Washington State Investment Board is responsible for managing investments for retirement plans for public employees, teachers, school employees, law enforcement officers, firefighters and judges in Washington State, as well as investments for other public funds that support or benefit industrial insurance, colleges and universities, and developmental disability programs in Washington State.